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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN BUI,

Defendant.

No. CR 09-00770 SI

**DEFENDANT'S REPLY TO THE  
SENTENCING MEMORANDUM OF  
THE UNITED STATES**

Date: March 5, 2010  
Court: Hon. Susan Illston  
Time: 11:00 a.m.

1 **I. INTRODUCTION**

2 The government concedes the truth of Mr. Bui's extraordinary family circumstances and  
3 acceptance of responsibility but asserts that these factors are somehow offset by prosecutorial  
4 restraint in seeking sentencing enhancements and in forbearing from criminal prosecution of his  
5 family members. Many of the enhancements are of doubtful application in this case and in any  
6 event, it appears that the government has adopted an across-the-board litigation strategy of  
7 bargaining them away in all of the United Investments (Danny Chou-related) mortgage fraud  
8 cases currently pending before the Court. Prosecution of family members would have been  
9 difficult – unlike with Mr. Bui himself, the government has obtained no confessions from any  
10 family member and there is no proof that their involvement was anything other than innocent and  
11 unwitting. The government concedes that Mr. Bui and Mr. Bui alone was the broker in his own  
12 business and that he obtained the false verifications using a network controlled by United  
13 Investments' Danny Chou, not any network in his own office. Accordingly, these after-the-fact  
14 mentions of leniency do not refute Mr. Bui's detailed showing on section 3553 factors.

15 That showing is unopposed. The government raises no dispute as to the extremity of Ms.  
16 Tran's situation with the autistic child or the lack of other means of daily parental support. Nor  
17 does the government contest the extraordinary nature of Mr. Bui's acceptance of responsibility in  
18 confessing the full extent of his conduct, disclosing all of his assets and paying over every dollar  
19 in his possession in satisfaction of a massive forfeiture judgment. And, the government agrees  
20 that it would have required heroic efforts to track down a loss amount in this case absent the  
21 confession by Mr. Bui that provided a gain figure. In arguing that Mr. Bui nonetheless should  
22 serve 51 months instead of 25 months, the government does not explain how the longer sentence  
23 "deters" others from like offenses in a way that a 25 month sentence with a massive forfeiture  
24 judgment, permanent loss of livelihood and financial ruin would not be sufficient to do. Still less  
25 does the government show how, in this specific case, Mr. Bui will be more deterred by a 51  
26 month sentence than a 25 month sentence. The inarguable fact is that Mr. Bui fully recognizes  
27 the seriousness of his situation, the gravity of the offenses that he has committed and the  
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1 consequences his conduct has wrought. He has already paid a very heavy price for his crimes  
2 and is effectively deterred from future conduct. A sentence of 25 months is more than sufficient  
3 to serve the remaining goals of sentencing.

## 4 **II. ARGUMENT**

### 5 **A. Mr. Bui's Plea Agreement Does Not Reflect Leniency**

6 The government opposes Mr. Bui's request for a sentencing variance because it claims  
7 already to have taken his extraordinary circumstances into account by conferring two separate  
8 forms of leniency on Mr. Bui: (1) opting not to seek certain offense enhancements and to base its  
9 guidelines calculations on gain, rather than loss; and (2) declining to prosecute members of Mr.  
10 Bui's family for their alleged involvement in his criminal activities. Govt. Sent. Memo. at 15-16.

11 As a general observation, because neither of these purported favors formed part of the plea  
12 negotiations in this case and are not reflected in the plea agreement, their assertion at this late  
13 stage should be viewed with some skepticism (plea agreements are required to contain all  
14 material terms of the bargain and are construed strictly against the government).

15 More specifically, with respect to its claim of forbearance on sentencing enhancements,  
16 the government's position reflects its global strategy in all of the Danny Chou/United  
17 Investments mortgage fraud cases, not its particularized consideration of Mr. Bui's individual  
18 circumstances. Defense counsel has reason to believe that the government asserted few, if any  
19 sentencing enhancements against the other brokers who engaged in precisely the same conduct as  
20 Mr. Bui. Moreover, many of the enhancements cited by the government simply do not apply to  
21 Mr. Bui. As to the government's claim of restrained treatment of Mr. Bui's family, there is  
22 simply no showing that the family members in question are criminally culpable, rather than  
23 unwitting participants or uninvolved ministerial employees. Further, it is undisputed that Ms.  
24 Tran and Justin Bui – the family members affected by the extraordinary circumstances – had no  
25 involvement whatsoever in Mr. Bui's business. Accordingly, Ms. Tran and Justin Bui cannot  
26 have been part of the government's leniency calculus. Finally, even if there had been  
27 contemporaneous back-and-forth bargaining and the government and defense had agreed that the  
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1 guidelines incorporated various forms of leniency, such considerations would not foreclose a  
 2 variance on extraordinary family circumstances. The extraordinary family circumstances  
 3 departure focuses on the *affected family members* and whether or not the recommended sentence  
 4 would inflict extraordinary suffering on them. It does not focus on whether or not the  
 5 recommended sentence would be lenient for the defendant. Because the government essentially  
 6 concedes the extraordinary nature of the circumstances of Ms. Tran and Justin Bui in this case,  
 7 the Court should grant the requested sentencing variance.

8 **(I) The Government Has Adopted Plea Bargaining Strategies Eliminating**  
 9 **Enhancements Across the Board in these Mortgage Fraud Cases**

10 The strategy not to seek enhancements against Mr. Bui and to base the guidelines  
 11 calculations on gain rather than loss reflects the government's general litigation stance in these  
 12 Danny Chou/United Investments mortgage broker cases. The government has uniformly sought  
 13 few or no enhancements against the involved brokers in exchange for early resolutions.

14 The government states that it has prosecuted 12 individuals in the conspiracy, including  
 15 Mr. Bui. Six are low-level employment verifiers (see footnote 2, *supra*). The five remaining  
 16 defendants, like Mr. Bui, were mortgage brokers who engaged in fraud. These five earned \$13  
 17 million during the time period of the offense conduct. Gov. Sent. Memo. at 6. The defense has a  
 18 good faith basis to believe that the understandings reached between the government and the  
 19 defendants in these other cases reflect virtually none of the enhancements that the government  
 20 asserts it restrained itself from seeking here because of Mr. Bui's individual family  
 21 circumstances.<sup>1</sup> Thus, the government's sentencing decisions in this case are not materially  
 22 different from the decisions it has made in all of the broker cases, where family circumstances or  
 23 extraordinary acceptance of responsibility are not at play.

24 Moreover, in drafting Mr. Bui's plea agreement, the government never included mention  
 25 of the fact that it was engaging in such a generous exercise of leniency. *See United States v.*  
 26 *Abbott*, 241 F.3d 29, 33-34 (1st Cir. 2001) (noting the necessity of "[f]ull disclosure to the

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27 <sup>1</sup> Further, the defense has a good faith basis to believe that all of these agreements, like  
 28 Mr. Bui's, rely on gain as a measure of culpability, rather than loss.

district court of the material terms of plea agreements”); *United States v. Moore*, 931 F.2d 245, 249 (4th Cir. 1991) (stating that Rule 11 “is properly read to mean that all material terms (or material ‘details’ or ‘elements’) of the agreement must be disclosed”) (collecting cases). To the contrary, the government specifically permitted Mr. Bui to argue for a sentencing variance on Section 3553 grounds (in full knowledge of Mr. Bui’s family circumstances and his acceptance of responsibility). This would be a strange bargain for the government to strike if it believed that Mr. Bui had already received the benefit of these very 3553 factors in the guideline calculations agreed on by the parties. Because the plea agreement is silent about the benefits the government now claims it conferred on Mr. Bui, the Court should assume that no such benefits were contemplated or reflected in the guideline calculation. *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (“In the context of plea agreements, the government is usually the drafter and must ordinarily bear the responsibility for any lack of clarity.”) (internal quotations omitted); *United States v. De la Fuente*, 8 F.3d 1333, 1338 (9th Cir. 1993) (“Construing ambiguities in favor of the defendant makes sense in light of the parties’ respective bargaining power and expertise.”).

**(ii) Many of the Enhancements Do Not Apply in Mr. Bui’s Case**

Even if the government had not adopted a one-size-fits-all litigation strategy of securing early plea bargains without pressing for enhancements, many of the sentencing enhancements that the government claims to have refrained from seeking in fact do not apply to Mt. Bui.

For example, the government states that it could have sought an enhancement under section 2B1.1(b)(2) because Mr. Bui’s offense involved more than ten victims. Govt. Sent. Memo, 16. However, Ninth Circuit law defines “victims” under section 2B1.1 as only those individuals or institutions who “sustained a loss that is monetary or that otherwise is readily measurable in money and that loss must be included in the loss calculation.” *United States v. Armstead*, 552 F.3d 769, 780-81 (9th Cir. 2008). Here, no losses to lenders were included in a loss calculation, precluding application of this enhancement.

The government also contends that Mr. Bui’s offense level could be enhanced by 4 points

under section 3B1.1 because he was a “leader or organizer” of a mortgage fraud operation that involved five or more participants or was otherwise extensive. Govt. Sent. Memo., 16.

A “participant” is one who is “criminally responsible for the commission of the offense” (U.S.S.G. § 3B1.1, Application Note 1), and to be eligible for this enhancement, Mr. Bui must have been “exercised some control over others involved in the commission of the offense or he must have been responsible for organizing others for the purpose of carrying out the crime.” *United States v. Hoac*, 990 F.2d 1099, 1110 (9th Cir. 1993) (vacating sentence including aggravating role enhancement). However, aside from Mr. Bui, the criminally responsible participants in this scheme were other independent brokers and individuals who posed as employment verifiers. Mr. Bui had no role in supervising or leading these individuals – the brokers worked from ringleader Danny Chou’s office, and the purported employment verifiers also were recruited and controlled by Chou. As the government concedes, these persons were in “Chou’s network of bogus employers” and it was Chou who “recruited [them] for the brokers” (Gov. Sent. Memo. at 3).<sup>2</sup>

Although the government implies criminal participation by Bui family members who worked at various times in the business, there is no evidence that any of them knew that Mr. Bui

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<sup>2</sup> The Court has sentenced all six of the individuals who served as fake employers for United Investments. There is not one mention of John Bui in any of these cases. Rather, in each case, the government’s sentencing memorandum confirms that Danny Chou, not Mr. Bui, recruited and organized the network of fake employers. Government’s Sentencing Memorandum at 3-4, *United States v. Hu*, No. 3:09-01106 (N.D. Cal. Jan.7, 2010) (“One of the companies utilized by United for purposes of falsifying employment information on loan applications as described above was ABC Insurance dba Asian Business Care (‘ABC’), which was owned and operated by the defendant since at least 2004. On July 28, 2009, the FBI interviewed Ms. Hu and she said that she met United’s owner through ABC and that that person asked her to tell banks that United clients were employed with ABC even though they were not because it would help get the clients’ loans approved. Hu agreed to do so . . . Hu admitted that she received several payments for performing this VOE service for United.”); *see also* government sentencing memoranda in *United States v. Chao*, CR 09-0931 SI (N.D. Cal. Jan.19, 2010) (same); *United States v. Chua*, CR 09-0954 SI (N.D. Cal. Jan.7, 2010) (same); *United States v. Cochico*, CR 09-1096 SI (N.D. Cal. Dec. 11, 2009) (same); *United States v. Le Lac*, CR 09-1078 SI (N.D. Cal. Dec. 8, 2009) (same); *United States v. Im*, CR 09-1161 SI (N.D. Cal. Jan.7, 2010) (same).

1 was submitting false information on mortgage applications.<sup>3</sup> As the PSR and government both  
 2 agree, the only broker in Mr. Bui's business was Mr. Bui himself, and it was Mr. Bui who  
 3 originated all of the loans. Govt. Sent. Memo. at 2; PSR ¶ 9. Mr. Bui's family members at  
 4 various times were employed in ministerial roles, transferring information to banks, organizing  
 5 paperwork, filing and secretarial work. Family members had no role in originating loans,  
 6 handling substantive meetings with clients or providing false employment verifications.

7 On abuse of trust under section 3B1.3, while Mr. Bui was a broker, this was not a  
 8 fiduciary role with respect to either the banks or the customers.<sup>4</sup> Given the nature of the overall  
 9 offense conduct, involving arms-length deals with banks that had erased due diligence controls –  
 10 with the predictable, if not intended results that applicants would lie as to their credit-worthiness  
 11 – it is difficult to see the fairness in applying such an enhancement to Mr. Bui.

12 Finally, with respect to sophisticated means (U.S.S.G. § 2B1.1), while the case law  
 13 admittedly takes a liberal approach to applying this enhancement, much of what Mr. Bui did was  
 14 not very sophisticated. Rather, in many instances, the lies as to credit-worthiness were very basic  
 15 – the submission without more of a form falsely stating the applicant's employer and annual  
 16 income (the so-called "liar loans"). *See, e.g.,* Alan Zibel, "*Liar Loans*" *Threaten to Prolong*  
 17 *Mortgage Crisis*, Huffington Post, Aug. 18, 2008 ("In the mortgage industry, they are called "liar  
 18 loans" – mortgages approved without requiring proof of the borrower's income or assets.").<sup>5</sup> As  
 19 to the loans requiring paperwork, the extent of the paperwork was minimal because the banks  
 20 needed to book loans at a rapid rate in order to securitize them into bundles that could be sold on  
 21

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22 <sup>3</sup> Nor does the fact that Mr. Bui involved some family members in shredding prove *their*  
 23 criminal culpability – there is no evidence that Mr. Bui told anyone that he was trying to destroy  
 24 loan files for an improper purpose.

25 <sup>4</sup> The government relies on *Lingsch v. Savage*, 213 Cal.App.2d 729, 736 (1963), for the  
 26 proposition that Mr. Bui had a fiduciary duty. *Lingsch*, however, stands only for the  
 27 proposition that a real estate broker representing a seller has a duty to disclose facts that may be  
 unknown to the buyer; it does not address whether a broker has a fiduciary duty to the lending  
 institution.

28 <sup>5</sup> [www.huffingtonpost.com/2008/08/18/liar-loans-threaten-to-po\\_n\\_119650.html](http://www.huffingtonpost.com/2008/08/18/liar-loans-threaten-to-po_n_119650.html)



Wall Street. The banks cared little about the credit-worthiness of the individual borrower – indeed, they expected to that bad loans would be funded. The idea was to spread the risk of the bad loans throughout the bundles of securities. *See* Ben S. Bernanke Testimony before U.S. House of Representatives, Committee on Financial Services: *Subprime Mortgage Lending and Mitigating Foreclosures*, (Sept. 20, 2007), at 1-2 (“The originate-to-distribute model seems to have contributed to the loosening of underwriting standards in 2005 and 2006. When an originator sells a mortgage and its servicing rights, depending on the terms of the sale, much or all of the risks are passed on to the loan purchaser. Thus, originators who sell loans may have less incentive to undertake careful underwriting than if they kept the loans.”).<sup>6</sup> The banks’ business model had changed from the decades-long tradition of acquiring individual, long term mortgages backed by solid collateral to the get-rich-quick model of booking loans of dubious quality in order to assemble packages of securitized debt obligations that could be traded on the market. *See* Kathleen Pender, *Mortgage Options Explode*, San Francisco Chronicle, Apr. 13, 2006 (discussing increased use of exotic loan packages);<sup>7</sup> *see also* Steven Krystofiak, President, Mortgage Brokers Association for Responsible Lending, Testimony before the Federal Reserve (Aug. 2006).<sup>8</sup> In short, the fraud largely involved elementary deception – lies on a form that would undergo only the most glancing examination by a bank.<sup>9</sup>

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<sup>6</sup> [www.federalreserve.gov/newsevents/testimony/bernanke20070920a.htm](http://www.federalreserve.gov/newsevents/testimony/bernanke20070920a.htm)

<sup>7</sup> [articles.sfgate.com/2006-04-13/business/17291505\\_1\\_interest-only-loans-home-equity-refinancers](http://articles.sfgate.com/2006-04-13/business/17291505_1_interest-only-loans-home-equity-refinancers)

<sup>8</sup> [www.federalreserve.gov/secrs/2006/august/20060801/op-1253/op-1253\\_3\\_1.pdf](http://www.federalreserve.gov/secrs/2006/august/20060801/op-1253/op-1253_3_1.pdf)

<sup>9</sup> The government cites *Lemon v. United States*, 278 F.2d 369 (9th Cir. 1960), and *United States v. Ciccone*, 219 F.3d 1078 (9th Cir. 2000), for the proposition that the gullibility and negligence of the victim-lenders cannot, as a matter of law, provide support for Mr. Bui’s variance motion. Govt. Sent. Memo. at 14. As described in Mr. Bui’s opening sentencing memorandum, however, the reckless lending practices of the victim-lenders were not the result of negligence or gullibility. Rather, these lenders made conscious, profit-motivated decisions to extend increasing amounts of “liar loans,” negative amortization loans and option arm loans. *See* Steven Krystofiak, President, Mortgage Brokers Association for Responsible Lending, Testimony before the Federal Reserve (Aug. 2006), [www.federalreserve.gov/secrs/2006/august](http://www.federalreserve.gov/secrs/2006/august)



**B) The Alleged Culpability of Mr. Bui's Family Members is Irrelevant to the Court's Decision Whether to Grant a Sentencing Variance**

The government argues that the Court should decline a variance because the agreed-upon guidelines range already reflects the government's restraint in not prosecuting Mr. Bui's family. However, a decision whether to grant a variance because of extraordinary family circumstances must be based on the effect of incarceration on a defendant's family, not on the alleged culpability of the defendant or other persons whom the government has chosen not to prosecute. *See United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992) (stating that rationale for downward departure based on family circumstances is not defendant's culpability but "reluctan[ce] to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing").<sup>10</sup>

Had the government desired to increase Mr. Bui's sentence in return for lenience to his family, it could have done so during plea agreement negotiations, assuming that it had probable cause to prosecute those family members. *See Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); *see also Mosier v. Murphy*, 790 F.2d 62, 66 (10th Cir. 1986); *see also United States v. Rodriguez-Duenas*, No. 03-237-S-BLW, 2007 WL 1381779, at \*6 -7 (D. Idaho Apr. 30, 2007). Nothing in the plea agreement reflects that the government forbore prosecution of family members in exchange for Mr. Bui's guilty plea. That the government has chosen not to prosecute Mr. Bui's family reflects a sound exercise of prosecutorial discretion<sup>11</sup> but is not relevant to an

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[/20060801/op-1253/op-1253\\_3\\_1.pdf](#) ("Banks allow such high volumes of risky loans to be originated because days after the loan funds they get pooled together with millions of dollars of other loans and sold to financial institutions, pension companies, life insurance companies, foreign governments and the US federal government on Wall Street on what is called the secondary market.").

<sup>10</sup> The family members whom the government alleges played a part in the criminal conduct are not those who will suffer the impact of Mr. Bui's incarceration. Mr. Bui's partner, Ms. Tran, and his autistic son did not participate in the fraud, the obstruction of justice, or the witness tampering and were never employed by Mr. Bui. Yet it is they, along with the couple's other child, Matthew, who will be most hurt by Mr. Bui's absence during his imprisonment.

<sup>11</sup> Prosecution of those who may have assisted in the disposal of Mr. Bui's mortgage files would require proof that the charged persons destroyed the records "with the intent to impede,

analysis of the impact Mr. Bui's incarceration on his partner and son.<sup>12</sup>

**C) Greed was Not the Motive and Pointing out the Role of the Banks Does Not Detract from Acceptance of Responsibility.**

Citing a mansion in Las Vegas, two houses in the Bay Area and a multi-million dollar life investment vehicle, the government asserts that amassing a fortune was what drove Mr. Bui to commit his offense conduct. Gov. Sent. Memo. at 8. While it is true that Mr. Bui did not commit the offense to obtain basic items such as food or housing, it is also true that he was not motivated by greed, but rather a desire to provide for his family. The Las Vegas property was a commercial venture in which Mr. Bui was a part investor with many others, the two houses in the Bay Area he gave to his mother, brother and sisters and the beneficiaries of the multi-million life investment were his partner and two sons so that they could have provision in the event of his

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obstruct or influence the investigation" into J.B. Financial. 18 U.S.C. § 1519 (emphasis added). There is no evidence to indicate that the family members involved in the destruction of Mr. Bui's files had the requisite intent. *See* PSR ¶ 13 (acknowledging that "others" besides Mr. Bui were involved in the destruction of the files but stating only that "[Mr.] Bui did so with the intent of preventing the FBI from obtaining evidence."). As to the witness tampering charges, it is far from clear that the conduct of Mr. Bui's mother amounts to witness tampering. Assuming, *arguendo*, that Mr. Bui's mother knew of the contents of the sealed envelope that she handed to CI-2 (named CI-1 in the government's brief), simply discouraging a witness from disclosing information where that witness holds a Fifth Amendment privilege to remain silent, is not universally considered witness tampering. *United States v. Farrell*, 126 F.3d 484, 488-89 (3rd Cir. 1997) (holding that "§ 1512(b)(3)'s 'corruptly persuades' clause does not [prohibit] a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy"). As noted in Mr. Bui's opening Sentencing Memorandum, the Ninth Circuit has yet to decide this issue. *See* Defendant's Sentencing Memorandum at 3, fn. 1. It should be noted that the only Ninth Circuit district court to consider this issue, found the reasoning of the Third Circuit persuasive and held that merely encouraging a witness to not disclose information is not witness tampering. *United States v. Makham*, No. CR.03-30069-AA, 2005 WL 3533263, at \*7 (D. Or. Dec. 23, 2005).

<sup>12</sup> Nor should much reliance be placed on the government's decision not to attempt to forfeit the property of family members that had been posted to secure Mr. Bui's release. Forfeiture of collateral is never pursued in this district absent flight by a defendant. Further, Rule 46(f)(2) of the Federal Rules of Criminal Procedure provides for a setting aside of bail forfeiture where: (A) the surety later surrenders into custody the person released on the surety's appearance bond; or (B) it appears that justice does not require bail forfeiture. Mr. Bui waived release on his remand and none of the family members who had posted property was involved in the witness tampering, which would have provided ample grounds for a set aside.

1 death. There were no flashy cars, no fancy clothes and no high living. The frugal Mr. Bui spent  
 2 nothing on himself but rather saved and invested every penny for purposes of securing a future of  
 3 his family. While there is no gainsaying that Mr. Bui bought this family security with illegal  
 4 proceeds, greed appears not to have been the impulse behind his actions.

5 Nor is it appropriate to say that pointing out the role of the banks in the mortgage crisis  
 6 reverses Mr. Bui acceptance of responsibility. Rather, as discussed in the opening sentencing  
 7 memorandum, the causes of the mortgage and financial crisis were multifaceted and this case  
 8 involves market forces far out of Mr. Bui's control. One of those forces was the casino  
 9 atmosphere generated by the ever evolving and ever riskier practices of the lending institutions.  
 10 As housing prices sky-rocketed, lenders did not rein in credit, instead they marketed growing  
 11 numbers of interest-only and negative amortization loans. For example, in 2001 interest-only  
 12 loans comprised only 2.9% of Bay Area loans and negative amortization loans accounted for only  
 13 1.6% of lending. By 2005, these numbers had jumped to 42.6% and 29.1%, respectively. *See*  
 14 Steven Krystofiak, President, Mortgage Brokers Association for Responsible Lending,  
 15 Testimony before the Federal Reserve (Aug. 2006), *available at*  
 16 [http://www.federalreserve.gov/secre/2006/august/20060801/op-1253/op-1253\\_3\\_1.pdf](http://www.federalreserve.gov/secre/2006/august/20060801/op-1253/op-1253_3_1.pdf).

17 These are the facts. Acknowledging them as true serves only to aid in the understanding of why  
 18 Mr. Bui, an otherwise decent person, who had worked since the age of 14 to make a life in this  
 19 country for his mother, five siblings and two children, could possibly have fallen so far.

### 20 **III. CONCLUSION**

21 Based on the foregoing, Mr. Bui respectfully requests that the Court impose a sentence of  
 22 25 months.

24 Dated: March 3, 2010

Respectfully submitted,

25 /s/  
 26 \_\_\_\_\_  
 27 Mary McNamara  
 28 SWANSON & McNAMARA LLP  
 Attorneys for JOHN BUI